



University of Kentucky
UKnowledge

1970-1979

Briefs

6-2-1976

Maude Haddix v. Beulah Noble, Elvira Noble, Emmitt Gross, and R.C. Durr Company, Inc.

Petition for Rehearing 1975-SC-0670

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Follow this and additional works at: https://uknowledge.uky.edu/ky_appeals_briefs70s

 Part of the [Courts Commons](#)

Repository Citation

1975-SC-0670, Petition for Rehearing, "Maude Haddix v. Beulah Noble, Elvira Noble, Emmitt Gross, and R.C. Durr Company, Inc." (1976). 1970-1979. 99.

https://uknowledge.uky.edu/ky_appeals_briefs70s/99

This Brief is brought to you for free and open access by the Briefs at UKnowledge. It has been accepted for inclusion in 1970-1979 by an authorized administrator of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.



KYSC1975-SC-0670-01

{BDF9CBB6-4D30-4F9A-9927-57FEC06311F5}

{134944}{54-130314:135204}{060276}

PETITION FOR REHEARING

SUPREME COURT OF KENTUCKY

FILE NO. 75-670

MAUDE HADDIX..... APPELLANT

VS:

BEULAH NOBLE, ELVIRA NOBLE,
EMMITT GROSS and R. C. DURR
COMPANY, INC. APPELLEES

APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE J. DOUGLAS GRAHAM, JUDGE

PETITION FOR REHEARING
FILED

JUN 4 1976

EARL M. CORNETT
Hindman, Kentucky 41822

MARIHA LAYNE COLLINS *Attorney for Appellant,*
CLERK *Maude Haddix*

SUPREME COURT

It is certified that a true copy of this brief has been served by mail on the Honorable James L. King, Cox & King, Stanton, Kentucky 40380; and the Honorable J. Douglas Graham, Judge of Breathitt Circuit Court, Jackson, Kentucky 41339; on this the 1 day of June, 1976.

Earl M. Cornett
Attorney for Appellant *FN*

**TABLE OF CONTENTS
AND AUTHORITIES**

	Page
PREFACE	1-2
ARGUMENT	2-8
The appellant, Maude Haddix and her attorneys did not agree at the time of of the entry of the order overruling the motion and grounds for a new trial, that additional evidence would be taken and the case resubmitted to determine whether the judgment should be set aside.	2-8
CONCLUSION	8-9
APPENDIX	1a-2a

SUPREME COURT OF KENTUCKY

FILE NO. 75-670

MAUDE HADDIX..... APPELLANT

VS:

**BEULAH NOBLE, ELVIRA NOBLE,
EMMITT GROSS and R. C. DURR
COMPANY, INC. APPELLEES**

**APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE J. DOUGLAS GRAHAM, JUDGE**

PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

On May 7, 1976, this Court rendered an opinion affirming the judgment of the Breathitt Circuit Court and told us in the Delivered Opinion that it did so because the parties and their attorneys had agreed at the time of the entry of the order overruling the motion and grounds for a new trial that additional evidence would be taken and thereafter the case would be resubmitted.

The Court is advised that the appellant and her attorneys did not enter into such an agreement. For

this reason the appellant will be done a great injustice if the Court allows this opinion to stand. This is why we file our Petition for Rehearing and request the Court to withdraw its opinion and enter a new opinion deciding the case on the issues presented in the original briefs filed by the parties.

ARGUMENT

THE APPELLANT, MAUDE HADDIX AND HER ATTORNEYS DID NOT AGREE AT THE TIME OF THE ENTRY OF THE ORDER OVERRULING THE MOTION AND GROUNDS FOR A NEW TRIAL, THAT ADDITIONAL EVIDENCE WOULD BE TAKEN AND THE CASE RESUBMITTED TO DETERMINE WHETHER THE JUDGMENT SHOULD BE SET ASIDE.

The opinion of the Court rendered May 7, 1976, states in part as follows:

" . . . It was agreed between the parties and the attorneys at the time of the entry of the order overruling the motion and grounds for a new trial that the judgment of the court would not be vacated at that time but, that additional evidence would be taken and the case would be resubmitted after that evidence was taken to determine if the newly discovered evidence and the mistake, as alleged, justified the setting aside of the judgment."

The pertinent part of the Findings of Fact, Conclusions of Law, and Judgment entered by the

Breathitt Circuit Court on May 5, 1975, to which the Court refers to in the above part of their opinion is as follows:

"On the 24th day of August, 1973, the Defendants, upon learning where the line had been established, talked with the witness William L. Hatcher and filed an affidavit of Hatcher and a Motion to Set Aside the Judgment because of the mistake and newly discovered evidence, pursuant to CR 60.02.

At a proper hearing on the motion it was agreed between the parties and the attorneys that the judgment of the Court would not be vacated at that time but, that additional evidence would be taken and the case would be resubmitted, after the evidence was taken, to determine if the newly discovered evidence and the mistake, as alleged, justified the setting aside of the judgment." (Tr. 243).

The Court is in error in their finding that at the time of the entry of the Order overruling the Motion and Grounds for a New Trial, the parties and their attorneys agreed that additional evidence would be taken and the case resubmitted to the Court. This Motion and Grounds for a New Trial was filed on August 24, 1973, and after a hearing was held, the Court entered an Order on November 15, 1973, overruling the Motion and Grounds for a New Trial and further Ordering the Defendants to surrender

the property in question to the Plaintiff, Maude Haddix, immediately. The Order states as follows:

“The Court is of the opinion that the Motion and Grounds for a new Trial filed by Defendants, Elvira Noble and Emmitt Gross should be overruled.

It is therefore ordered and directed that the Motion and Grounds herein of the Defendants be and the same is overruled. The Defendants will surrender the property in question to the Plaintiff, Maude Haddix immediately.” (Tr. 161).

Nowhere in this Order is there any reference made concerning such an agreement. It stands to reason that if there had been such an agreement between the Parties, the Order overruling the Motion and Grounds for a New Trial would have indicated such and have set out this agreement. Further, it stands to reason that if there had been such an agreement made between the Parties, the Order overruling the Motion and Grounds for a New Trial would not have contained the statement ordering the Defendants to surrender the property to the Plaintiff immediately, but would instead have said that the property would not be surrendered to the Plaintiff until additional evidence was taken and the case resubmitted to the Court.

The Order of the Court stating that the Motion and Grounds for a New Trial be and the same is

hereby overruled, and ordering the Defendants to surrender the property in question to the Plaintiff immediately, we submit, shows clearly the intent of the Court to make this the Court's final Order in this case.

To further show that there was no such agreement between the Parties and that it was the intent of the Court and the Parties that the Order overruling the Motion and Grounds for a New Trial was to be a final order, nothing further was done in the case until the attorney for the appellant, Maude Haddix, on January 4, 1974, filed a Motion for Rule and Claim for damages asking the Court to punish the Defendants for contempt for failure to surrender the property herein. After a hearing was held and the Court being advised, the Court entered a dispossession order on February 18, 1974, which ordered the Sheriff of Breathitt County to take charge of the property and dispossess the Defendants and put the Appellant, Maude Haddix in possession of same at the Defendant's expense.

In this Order, the Court made a finding that the order of November 15, 1973, had directed the Appellees to surrender the property in question and that the Appellees had not complied with this Order. This Order does not make any reference to an agreement to take additional evidence. This Order is set out as follows:

"The Court entered an Order on the 15th day of November, 1973, directing the Defendants to surrender the property in question to Maude Haddix immediately. The Defendants have not complied with the Order as of November 15, 1973.

It is therefore Ordered and directed that the Sheriff of Breathitt County take charge of the property herein; dispossess the Defendants, and put Maude Haddix in possession of the same at the Defendant's expense." (Tr. 164).

It is submitted that had there been an agreement to take additional evidence and resubmit the case, the Court would not have made such a ruling on this Motion, but would have instead referred to the fact that there had been such an agreement of the parties. However, there is nothing in this Order to indicate any additional evidence was to be taken. It was not until March 19, 1974, that the attorney for the appellees filed a Motion and Grounds to set aside the Judgment and take additional evidence pursuant to CR 60.02.

It is submitted that it was the intent of the Appellees in filing this Motion to attempt to keep the Sheriff from serving this dispossession order. This Motion and Grounds to take Additional Evidence further reflects that there was no agreement between the Parties at the time the hearing was had on the Motion and Grounds for a

New Trial since nowhere in this Motion is there any reference made to the effect that there was ever such an agreement.

On June 11, 1974, the attorney for the Appellant after receiving Notice to Take Depositions by the Appellees, filed a Motion to Strike the Depositions if taken and when and if filed for the reason that the Court had never entered any Order permitting the Appellees to take the additional evidence. At the hearing on this motion no reference was ever made to such an agreement between the parties. The Court never entered an order either sustaining or overruling this Motion.

The Findings of Fact, Conclusions of Law and Judgment entered March 5, 1975, by the Circuit Court which contains the statements that this Court refers to in their opinion concerning an agreement of the parties about taking additional evidence is the first time the attorney for the appellant became aware of such an agreement.

This Judgment was either prepared by the attorney for the appellees or the court and the attorney for the appellant had no knowledge of the preparation of such Judgment nor were they permitted to inspect the Judgment prior to entry in order to voice their approval or disapproval concerning any statements contained therein.

After the judgment was entered and within the

time prescribed by the Civil Rules concerning an appeal, the appellant filed this appeal to this Court.

In all of the Motions, Orders and various pleadings contained and filed in the record, never was there any statements or reference made concerning an agreement between parties as to the taking of additional evidence, until entry of the Judgment of March 5, 1975. The court's findings of fact must be based upon substantial evidence of record. There is not any evidence of record to support the finding the court made concerning this agreement. On the contrary, all the evidence of record supports the fact that the parties made no such agreement.

The record simply does not support a finding by this Court that there was ever an agreement between the parties to take additional evidence. If there had been such an agreement, there would have been an Order in the record setting out this fact.

CONCLUSION

It is submitted that this court should withdraw their original opinion and enter a new opinion deciding the case on the issue which has been presented; that being whether or not a party is entitled to have a case reopened under a 60.02 motion when said motion contains the same

allegations as the Motion and Grounds for a New Trial contained. It is submitted that they cannot, and that their remedy at law was to appeal from the order denying their motion and grounds for a new trial.

We ask that you now reappraise your Delivered Opinion, withdraw same and reverse the Judgment of the Breathitt Circuit Court.

Respectfully Submitted,

EARL M. CORNETT
Hindman, Kentucky 41822
Attorney for Appellant

A P P E N D I X

RENDERED: May 7, 1976

SUPREME COURT OF KENTUCKY

75-670

MAUDE HADDIX

APPELLANT

V. APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE J. DOUGLAS GRAHAM, JUDGE
CIVIL ACTION NO. 2943

BEULAH NOBLE, ELVIRA NOBLE,
R.C. DURR COMPANY, EMMITT
GROSS

APPELLEES

MEMORANDUM OPINION PER CURIAM

AFFIRMING

None of the parties to this appeal raise any issue with respect to that portion of the findings of fact, conclusions of law and judgment which states that it was agreed between the parties and the attorneys at the time of the entry of the order overruling the motion and grounds for a new trial that the judgment of the court would not be vacated at that time but, that additional evidence would be taken and the case would be resubmitted after that evidence was taken to determine if the newly discovered evidence and the mistake, as alleged, justified the setting aside of the judgment.

In view of this finding we cannot say the trial court abused its discretion in permitting the case to be reopened and in entering a new judgment based on the evidence heard.

The judgment is affirmed.

All concur.

ATTORNEYS FOR APPELLANT:

Earl M. Cornett
1037 Chickasaw Trail
Frankfort, Kentucky 40601

John C. Cornett
Hindman, Kentucky 41822

ATTORNEY FOR APPELLEE:

James L. King
Stanton, Kentucky 40380

* * * * *